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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 409.

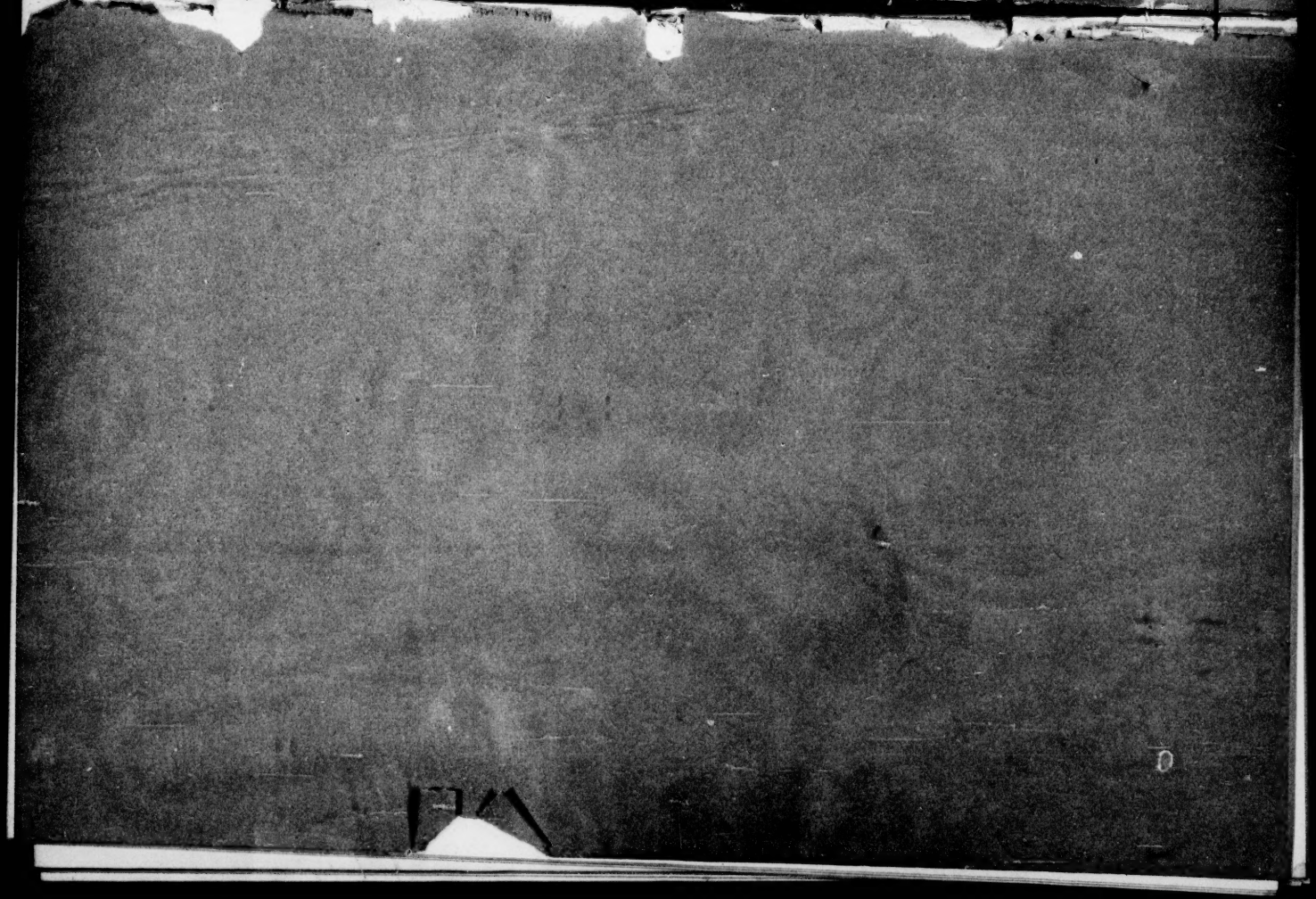
THE UNITED STATES, PLAINTIFF,

vs.

JAMES H. BRITTON AND BARTON BATES.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED OCTOBER 18, 1880.



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1 UNITED STATES OF AMERICA,
Eastern District of Missouri:

In the circuit court of the United States, in and for said district.

Be it remembered that on the 30th day of August, A. D. 1879, there was filed in the office of the clerk of the circuit court of the United States in and for the eastern district of Missouri a certain transcript of record, in words and figures following, to wit:

TRANSCRIPT FROM U. S. DISTRICT COURT.

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

IN CASE NO. 1590 OF THE UNITED STATES, plaintiff,
against
JAMES H. BRITTON & BARTON BATES, DEFENDANTS.

Be it remembered that on the 13th day of June, A. D. 1879, the grand jury of the United States of America in and for the eastern district of Missouri returned into the district court of said United States in and for said eastern district an indictment in the above-entitled case, which said indictment is in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

In the district court of the United States for the eastern district
2 of Missouri, at the May term thereof, A. D. 1879.

Indictment.

The grand jurors of the United States of America, duly empaneled, sworn and charged to inquire in and for the eastern district of Missouri, on their oaths, present, that on the 30th day of June, in the year of our Lord one thousand eight hundred and seventy-six, the National Bank of the State of Missouri in St. Louis was an association theretofore created and organized under and by virtue of an act of Congress, entitled "An act to provide a national currency secured by a pledge of United States bonds and to provide for the circulation and redemption thereof, approved June third, in the year of our Lord one thousand eight hundred and sixty-four, and was on said thirtieth day of June acting and carrying on a banking business in the city of St. Louis, within said district, under the said act of Congress and the acts amendatory thereof then in force and effect, and that James H. Burton and Barton Bates were on the thirtieth day of June aforesaid directors of said association.

And the jurors aforesaid, on their oaths aforesaid, do further present that the said James H. Britton and the said Barton Bates, did on the said thirtieth day of June, at said district, as directors as aforesaid, conspire, combine, confederate, and agree together to wilfully mis-
3 apply, with intent then and there to injure and defraud the said association and certain persons to the jurors aforesaid unknown,

a large sum, to wit, eighty-seven thousand five hundred dollars then belonging to the moneys and funds of said association, by causing and procuring to be by said association then declared and, afterwards, to wit, on the tenth day of July, in the year of our Lord one thousand eight hundred and seventy-six, by said association paid out of the moneys and funds of said association, the said sum of eighty-seven thousand five hundred dollars as a dividend of three and one-half per centum upon the capital stock of said association, that is to say, by means of causing and procuring as directors as aforesaid to be declared and paid by said association as aforesaid out of the moneys and funds of said association upon each and every of a large number, to wit, twenty-five thousand shares of the capital stock of said association, the sum of three dollars and fifty cents as and for a dividend of net profits of said association on hand in the moneys and funds of said association on said thirtieth day of June aforesaid, which said dividend so to be declared and paid as aforesaid, in pursuance of said conspiracy, was to be false and fraudulent in this, that there were on said thirtieth day of June on hand in the moneys and funds of said association no net profits then amounting to the said sum of eighty-seven thousand five hundred dollars, as they, the said James H. Britton and Barton Bates, directors as aforesaid, then and there well knew.

And the jurors aforesaid, on their oaths aforesaid, do further present that, afterwards, to wit, on the said thirtieth day of June aforesaid, and within said district, the said James H. Britton *or* directer as aforesaid, did in pursuance of and in order to effect the object of said conspiracy, combination, confederation, and agreement, so had as aforesaid, falsely represented to one Julius S. Walsh, he, the said Walsh, being on said thirtieth day of June a director of said association in substance and to the effect that the net profits of said association on said thirtieth day of June on hand were sufficient in amount to warrant and permit the declaration of said dividend, and did, on said thirtieth day of June, at said district, by means of said false representation, induce and procure the said Julius S. Walsh to assent, on said thirtieth day of June, at said district, to the declaration of said dividend, and to join on said thirtieth day of June, at said district, to the declaration of said dividend, and to join on said thirtieth day of June, at said district, as such director, with *with* them the said James H. Britton, and Barton Bates, directors as aforesaid, in the declaration in behalf of said association of said dividend, they, the said James H. Britton, Barton Bates, and Julius S. Walsh, on said thirtieth day of June, constituting a majority in number of the directors of said association; that afterward, to wit, on said thirtieth day of June, aforesaid, the said James H. Britton as *as* aforesaid, in further pursuance of and in order to effect the object of said conspiracy, combination, confederacy, and agreement, so had as aforesaid, did, within said district, cause and procure to be made by one Edward P. Curtis, in a certain book then belonging to and then in use by said association for the purpose of keeping, among other things, a record of the proceedings of the board of directors of said association, the following minutes and entry, that is to say "St. Louis, June 30th, 1876. Present Mes's. Britton and Walsh, Mr. Bates assenting on the 29th. Ordered that a dividend of 3½ % be declared, payable on the 10th proximo. and that the transfer books be closed till that date. Attest Edw. P. Curtis, cash'r. That afterwards, to wit, on the eighth day of July, in the year of our Lord one thousand eight hundred and seventy-six, the said James H. Britton in further pur, suance of, and in order to effect the object of said conspiracy, combi-

nation, confederacy and agreement, so had as aforesaid, being then
6 directors as aforesaid, did, with' said district, collect and receive from said association, and convert to his own use, a large sum of money, to wit, the sum of five thousand three hundred and ninety-seven dollars, on the day andat the district last aforesaid, part of said eighty-seven thousand five hundred dollars.

And the jurors aforesaid, on their oaths aforesaid, do further present that afterwards, to wit, on the eleventh day of July, in the year last aforesaid, the said Barton Bates, in further pursuance of and in order to effect the object of said conspiracy, combination, confederacy, and agreement so had, as aforesaid, being then directors as aforesaid, did, at said district, collect and receive from said association, and convert to his own use a large sum of money, to wit, the sum of four thousand one hundred and twelve dollars, on the day and at the district last aforesaid, part of the said eighty-seven thousand five hundred dollars, contrary to the form of the statute of the United States in such case made and provided, and against their peace and dignity.

And the jurors aforesaid, on their oaths aforesaid, do further present, that on the thirtieth day of June, in the year of our Lord one thousand eight hundred and seventy-six, "The National Bank of the State of
7 Missouri, in St. Louis," was an association theretofore created and organized under and by virtue an act of Congress, entitled "An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof, approved June 3rd, in the year of our Lord one thousand eight hundred and sixty-four, and was on said thirtieth day of June acting and carrying on a banking business in the city of St. Louis, within said district, under the said act of Congress, and the acts amendatory thereof then in force and effect, and that James H. Britton and Barton Bates were on the thirtieth day of June aforesaid directors of said association.

And the jurors aforesaid, on their oaths aforesaid, do further present that the said James H. Britton and the said Barton Bates did, on the said thirtieth day of June, at said district, as directors as aforesaid, conspire, combine, confederate, and agree together to wilfully misapply with intent then and there to injure and defraud the said association and certain persons to the jurors aforesaid unknown, a large sum, to wit, eighty-seven thousand five hundred dollars, then belonging to the moneys and funds of said association, by causing and procuring to be by said association then declared and, afterwards, to wit, on the tenth day of July, in the year of our Lord
8 one thousand eight hundred and seventy-six by said association, paid out of the moneys and funds of said association, the said sum of eighty-seven thousand five hundred dollars as *as* a dividend of three and one-half per centum upon the capital stock of said association, that is to say, by means of causing and procuring as directors as aforesaid to be declared and paid by said association as aforesaid out of the moneys and funds of said association upon each and every of a large number, to wit, twenty-five thousand shares of the capital stock of said association, the sum of three dollars and fifty cents as and for a dividend of net profits of said association on hand in the moneys and funds of said association on said thirtieth day of June aforesaid, which said dividend so to be declared and paid as aforesaid in pursuance of said conspiracy, was to be false and fraudulent in this that there were on said thirtieth day of June due and owing to said association the following debts, that is to say, from one James H. Britton, the sum of one hundred and eighty-three thousand two hundred and

thirty-nine dollars and ten cents; from one Richard L. Dickson, the sum of one hundred and thirty-two thousand six hundred and seventy-three dollars and forty-nine cents; from James B. Eads and Barton
9 Bates, as trustees of the estate of Charles K. Dickson, deceased, the sum of seventy-five thousand dollars; from James B. Eads and Barton Bates, executors of the estate of Charles K. Dickson, deceased, the sum of fifteen thousand eight hundred and eighty-one dollars and eighteen cents; from one John A. Dillon the sum of thirty-two thousand dollars; from one John A. Urbsdell, the sum of one hundred and ninety-five thousand nine hundred and seventy-eight dollars and fifty cents; from one George F. Britton, the sum of twenty-five thousand three hundred and nineteen dollars and thirty-five cents; from one Alfred M. Britton, the sum of thirty-seven thousand one hundred and twenty-two dollars and sixty-seven cents; and from and on account of one John J. Roe, then deceased, the sum of one hundred thousand dollars, which said debts then amounted in the aggregate to the sum of seven hundred and ninety-seven thousand two hundred and fourteen dollars and twenty-nine cents; that upon said debts so due and owing as aforesaid, there was interest owing to said association then past due and unpaid for a period of six months; and that the said debts so due and owing as aforesaid, were not then well secured and in process of collection, and which said aggregate amount of said debts was then largely in excess of the net profits and purported net profits of said association then on hand, as they, the said James H. Brit-
10 ton and Barton Bates, directors as aforesaid, then and there well knew; and that said debts were then bad debts within the meaning of section five thousand two hundred and four of the Revised Statutes of the United States, as they, the said James H. Britton and Barton Bates, directors as aforesaid, then and there well knew.

And the jurors aforesaid, on their oaths aforesaid, do further present, that afterwards, to wit, on the said thirtieth day of June aforesaid, and within said district, the said James H. Britton, a director as aforesaid, did, in pursuance of and in order to effect the object of said conspiracy, combination, confederacy, and agreement so had as aforesaid, falsely represent to one Julius S. Walsh, he, the said Walsh, being on said thirtieth day of June a director of said association, in substance and to the effect that the net profits of said association on said thirtieth day of June on hand were sufficient in amount to warrant and permit the declaration of said dividend, and did on said thirtieth day of June, at said district, by means of said false representation induce and procure the said Julius S. Walsh to assent, on said thirtieth day of June, at said district, to the declaration of said dividend, and to join on said thirtieth day of June, at said district, as such director, with them the said James H. Britton
11 and Barton Bates, directors as aforesaid, in the declaration on behalf of said association, of said dividend, they, the said James H. Britton, Burton Bates, and Julius S. Walsh, on said thirtieth day of June, constituting a majority in number of the directors of said association; that afterwards, to wit, on said thirtieth day of June aforesaid, the said James H. Britton, as director as aforesaid, in further pursuance of, and in order to effect the object of said conspiracy, combination, confederacy, and agreement so had as aforesaid, did, within said district, cause and procure to be made by one Edward P. Curtis, in a certain book then belonging to, and then in use by, said association for the purpose of keeping, among other things, a record of the proceedings of the board of directors of said association, the following min-

ute and entry, that is to say, "St. Louis, June 30th, 1876. Present, Mess. Britton and Walsh; Mr. Bates assenting on the 29th. Ordered that a dividend of 3½%. We declared payable on the 10th proximo, and that the transfer books be closed till that date. Attest "Edw. P. Curtis, cash'r;" that afterwards, to wit, on the eighth day of July, in the year of our Lord one thousand eight hundred and seventy-six, the said James H. Britton, in further pursuance of and in order to effect the object of said conspiracy, combination, confederacy, and agree-
12 ment so had as aforesaid, being then director as aforesaid, did, within said district, collect and receive from said association, and convert to his own use, a large sum of money, to wit, the sum of five thousand three hundred and ninety-seven dollars on the day and at the district last aforesaid, part of said eighty-seven thousand five hundred dollars.

And the jurors aforesaid, on their oaths aforesaid, do further present, that afterwards, to wit, on the eleventh day of July, in the year last aforesaid, the said Barton Bates, in further pursuance of and in order to effect the object of said conspiracy, combination, confederacy, and agreement so had as aforesaid, being then director as aforesaid, did, at said district, collect and receive from said association and convert to his own use a large sum of money, to wit, the sum of four thousand one hundred and twelve dollars, on the day and at the district last aforesaid, part of the said eighty-seven thousand five hundred dollars, contrary to the form of the statute of the United States in such case made and provided and against their peace and dignity.

WILLIAM H. BLISS,
Attorney of the United States for the Eastern District of Missouri.

And afterwards, to wit, at a regular stated term of the district court of the United States in and for the eastern district of Missouri,
13 begun and holden on the first Monday, the fifth day of May, A. D. 1879 (at the city of St. Louis, in said eastern district), the following proceedings were had of record in this case on Saturday, the fourteenth day of June, A. D. eighteen hundred and seventy-nine, to wit:

Plea, not guilty, by def't Britton.

THE UNITED STATES, PLAINTIFF,
ag'st
JAMES H. BRITTON ET AL., DEFENDANTS.
} No. 1590. Indictment for conspiracy to misapply national bank funds, 5440 & 5209.

This day comes the United States by district attorney, and the said defendant James H. Britton also comes by Thomas C. Fletcher, his attorney, and the said defendant by his said attorney, enters his appearance in this cause and enters his plea of not guilty to the charges as contained in the said indictment.

And afterwards, at said regular stated term of said district court, begun and holden as aforesaid, the following further proceedings were had of record in this case on Monday, the sixteenth day of June, A. D. eighteen hundred and seventy-nine, to wit:

Order remitting indictment to circuit court.

THE UNITED STATES, PLAINTIFF, *ag'st* JAMES H. BRITTON AND BARTON BATES, defendants. } No. 1590. Indictment for conspiracy to misapply national bank funds. Sec's 5440 & 5209 of the Rev. Stat. of U. S.

This day comes the United States by district attorney, and also comes the said defendant Barton Bates herein, by John B. Henderson and Chester H. Krum, esquires, his attorneys, and the said defendant
14 Bates, by his said attorneys, enters his appearance in this cause, and also enters his plea of not guilty to the charges as contained in the said indictment herein against him, and, on the motion of the district attorney, it is ordered that the indictment pending in this court in the above-entitled cause, be, and hereby is, now remitted and transferred to the next regular stated term and session of the circuit court of the United States in and for the eastern district of Missouri, to be begun and holden at the city of St. Louis, in said eastern district, on the third Monday, the fifteenth day of the month of September next, (1879), for proceedings thereon according to law; and it is further ordered that the clerk of this court make out and certify to the said circuit court a full, true, and complete transcript of the record and proceedings in said cause.

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

I, Joseph H. Clark, clerk of the district court of the United States in and for the eastern district of Missouri, do hereby certify the writing hereto annexed to be a true transcript of the record and proceedings in case No. 1590, A. D. 1879, of The United States, plaintiff, against James H. Britton & Barton Bates, defendant', as fully as the same remains on file and of record in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office in the city of St. Louis, in said district, this 18th day of August, in the year of our Lord 1879.

[SEAL.] JOSEPH H. CLARK,
Clerk of said Court.

15 And afterwards, to wit, on the 29th day of January, 1880, the following demurrer was filed in said cause, to wit:

Demurrer to indictment.

In the circuit court of the United States for the eastern district of Missouri.

UNITED STATES OF AMERICA
vs.
JAMES H. BRITTON AND BARTON BATES.

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

Demurrer of James H. Britton and Barton Bates to indictment No. 1534.

And the said James H. Britton and the said Barton Bates, in their

own proper person, come here into court, and having heard the said indictment read, say that the said indictment and the matter therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law, and that the said James H. Britton and the said Barton Bates are not bound by the law of the land to answer the same; and this they are ready to verify.

Whereupon, for want of a sufficient indictment in this behalf, the said James H. Britton and the said Barton Bates pray judgment, and that by the court they may be dismissed and discharged
16 from the said premises in the said indictment specified.

JAMES H. BRITTON AND
BARTON BATES,
By CHESTER H. KRUM AND
SAM'L T. GLOVER,
Their Attorneys.

And afterwards, to wit, on the 10th day of March, 1880, the following proceedings were had and appear of record in said cause, to wit:

Ordered, that the following be entered nunc pro tunc as of February 4th, A. D. 1880:

THE UNITED STATES, PLAINTIFF,
vs.
JAMES H. BRITTON AND BARTON BATES, DEFENDANTS.

Now, at this day comes The United States, by William H. Bliss, esqr., district attorney, and the defendants being in court in compliance with their recognizances herein and by their attorneys, this cause came on for hearing *hearing* upon the demurrer of said defendants to the indictment herein, and upon the questions of law arising upon said demurrer the judges were divided and opposed in opinion.

It is now, therefore, ordered that the clerk of this court make out and certify to the next term of the Supreme Court of the United States a transcript of the record and proceedings in this cause as fully
17 as the same are described in the certificate of division this day filed.

MEMO.—His honor Judge Treat took no part in the hearing of this case.

Said certificate of division is in words and figures following, to wit:

Certificate of division.

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

In the circuit court of the United States in and for said district.

UNITED STATES
vs.
JAMES H. BRITTON AND BARTON BATES. } No. 1534.

This is an indictment under § 5440 of the Revised Statutes of the United States for conspiracy to wilfully misapply, in violation of § 5209 of said Revised Statutes, monies of the National Bank of the State of

Missouri, of which bank the defendant James H. Britton was president and both defendants were directors. *were*

The following is a copy of the indictment:

(See page 2.)

To the said indictment a demurrer was interposed, as follows:

(See page 15.)

And the said demurrer to said indictment coming on to be heard at this term, the following questions arose:

1st. Whether, under section 5209 of the Revised Statutes of the United States it was necessary to aver that the alleged con-
18 spiracy was entered into with intent to injure and defraud; and whether the several counts in this indictment not containing the said allegations are good and sufficient in law.

2nd. Whether it was necessary in this indictment, in addition to the allegations charging the consperacy to wilfully misapply certain funds and property of the association, by means of procuring to be made by the board of directors a dividend, as alleged in the indictment, to further allege that said dividend was in pursuance of said conspiracy declared and made; and, if so, whether the same is sufficiently charged therein, and whether it was also necessary to allege that said dividend was fraudulent when declared, and also when paid.

3rd. Whether, under § 5209 of the Revised Statutes of the United States, it was necessary in this indictment to charge that the funds alleged to have been misapplied had been previously entrusted to the possession of the defendants.

4th. Whether the indictment in this case alleges with sufficient that the bank had no net profits out of which to declare and pay the dividend alleged to have been fraudulent.

5th. Whether the said defendants, as directors of the said banking association, are liable to the penalties provided by the said § 5209 upon proof that they, as such directors, wilfully voted for the declaration of a dividend, knowing that there were no net profits out of which
19 to pay the same; and, if liable, must the indictment charge that such dividend was ordered or voted for with intent thereby to defraud the association or other persons.

On which questions the judges were divided and opposed in opinion; whereupon, upon motion of the plaintiff, by its attorney, that the said points upon which the disagreement hath happened may during the term be stated under the direction of the judges, and certified under the seal of the court to the Supreme Court to be finally decided:

It is ordered that the foregoing state of the proceedings and questions be certified, according to the request of plaintiff, by his attorney, and as required by the law in that case made and provided.

Given under our hands and seals this fourth day of February, A. D. 1880.

(S'g'd) GEO. W. McCRARY. [SEAL.]
(S'g'd) HENRY C. CALDWELL. [SEAL.]

20 UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

I, M. M. Price, clerk of the circuit court of the United States in and for the eastern district of Missouri, do hereby certify that the writing hereto attached to be a true transcript of the pleadings and proceedings in case No. 1534, of the United States, plaintiff, against James H. Britton and Barton Bates, defendants, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office in the city of St. Louis, in said district, this second day of July, in the year of our Lord eighteen hundred and eighty.

[SEAL.]

M. M. PRICE,
Clerk of said Court,
By A. P. SELBY,
Deputy.

(Indorsed:) No. 1534. United States circuit court, eastern district of Missouri. United States against James H. Britton and Barton Bates. Duly certified transcript in the above-entitled cause.

(Indorsement on cover:) No. 409. The United States, plaintiff, vs. James H. Britton and Barton Bates. E. Missouri C. C. U. S. Filed 18th October, 1880.